U.S.

(2)

No. 09-600

In the Supreme Court of the United States

YEWHALASHET ABEBE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the denial of relief from removal under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), violates the equal protection component of the Due Process Clause, when an alien who is removable because he committed a specific aggravated felony is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility.

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OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1-36), as amended, is reported at 554 F.3d 1203. The prior, now vacated, panel decision of the court of appeals (Pet. App. 37-78) is reported at 493 F.3d 1092. A contemporaneous, also vacated, panel decision remanding the case to the Board of Immigration Appeals for reconsideration of petitioner's application for withholding of removal (Pet. App. 79-80) is not published in the *Federal Reporter* but is reprinted in 240 Fed. Appx. 198. The order of the court of appeals denying a petition for rehearing (Pet. App. 92-113), is reported at 577 F.3d 1113. The orders of the Board of Immigration Appeals (Pet. App. 81-84) and the immigration judge (Pet. App. 85-91) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2009. A petition for rehearing was denied on August 18, 2009 (Pet. App. 92). The petition for a writ of certiorari was filed on November 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. By its terms, Section 212(c) applied only to certain aliens in exclusion proceedings (*i.e.*, proceedings in which aliens were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"). In 1976, however, the Second Circuit determined that making that discretionary relief available to aliens who had departed the United States while denying it to aliens who remained in the United States violated equal protection. *Francis* v. *INS*, 532 F.2d 268, 273. The Board of Immigration Appeals (Board) adopted that rationale on a nationwide basis in *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976), so that Section 212(c) was generally construed as being available in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In applying the principle of treating those in deportation proceedings like those in exclusion proceedings, the Board has long maintained that an alien in deportation proceedings can obtain Section 212(c) relief only if the ground for his deportation has a comparable ground among the statutory grounds of exclusion. See, *e.g.*, *In re Wadud*, 19 I. & N. Dec. 182 (B.I.A. 1984); *In re Gra-*

nados, 16 I. & N. Dec. 726 (B.I.A. 1979). That practice is known as the "comparable ground" or "statutory counterpart" test, and it has been codified by regulation at 8 C.F.R. 1212.3(f)(5).[1]

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain offenses, including aggravated felonies. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety. IIRIRA also did away with the distinction between "deportation" and "exclusion" proceedings, designating them both as "removal" proceedings. See §§ 303-306, 110 Stat. 3009-585.

In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of a plea agreement that the alien made at a time when he might have relied on his possible eligibility for Section 212(c) relief in spite of the resulting conviction. 533 U.S. at 314-326. Although some aliens necessarily benefitted from the conclusion that Section 212(c)'s repeal was not retroactively applicable, the Court did not suggest that aliens would not still be subject to any pre-existing limi-

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[1] In pertinent part, 8 C.F.R. 1212.3(f) states:

> An application for relief under former section 212(c) of the Act shall be denied if: * * * (5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

tations on their eligibility for relief under Section 212(c), including the "statutory counterpart" test.

As relevant to the circumstances of this case, the operation of that test was further clarified by the Board of Immigration Appeals in *In re Blake*, 23 I. & N. Dec. 722 (2005), remanded, 489 F.3d 88 (2d Cir. 2007), and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (2005), petition for review denied, 482 F.3d 356 (5th Cir. 2007). Those cases held that a statutory ground of exclusion or inadmissibility is a "comparable ground[]" to the charged ground of deportation only if the two grounds use similar language to describe "substantially equivalent categories of offenses." *Id.* at 771; *In re Blake*, 23 I. & N. Dec. at 728. In *In re Blake*, the Board held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for sexual abuse of a minor. *Id.* at 729. In *In re Brieva-Perez*, the Board similarly held that the "crime involving moral turpitude" ground of inadmissibility was not comparable to the ground of removal of having an aggravated felony conviction for a crime of violence. 23 I. & N. Dec. at 773. Well before the Board published those precedential decisions, however, the analytical underpinnings of its interpretation had been confirmed by, among others, the Ninth Circuit's decision in *Komarenko* v. *INS*, 35 F.3d 432 (1994).

In 2007, the Second Circuit disagreed with *Komarenko* and the "several other circuits" that had followed it. *Blake* v. *Carbone*, 489 F.3d 88, 103-104. The Second Circuit recognized that the statutory-counterpart test codified in 8 C.F.R. 1212.3(f)(5) did "nothing more than crystallize the agency's preexisting body of law and therefore [could not] have an impermissible retroactive effect"; but the Second Circuit held that, when analyzed

on the basis of a "particular criminal offense[]," the ground of inadmissibility for a "crime involving moral turpitude" was sufficiently comparable to an aggravated felony of sexual abuse of a minor to permit relief under former Section 212(c). *Blake*, 489 F.3d at 98-99, 101, 103.

2. Petitioner is a native and citizen of Ethiopia who was accorded lawful permanent resident status in 1984. Pet. App. 2. In 1992, petitioner pleaded guilty to two counts of lewd and lascivious conduct upon a child under the age of 14, in violation of California law. *Id.* at 2, 82, 86-87. Based on his conviction, petitioner was placed in removal proceedings in 2005, and an immigration judge ruled that petitioner was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien who has been convicted of an aggravated felony (specifically, "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A)). Pet. App. 86. The immigration judge also denied petitioner's application for relief under former Section 212(c), and ordered him removed to Ethiopia. *Id.* at 82, 86.

On June 10, 2008, the Board dismissed petitioner's appeal. It agreed with the immigration judge that, pursuant to the Board's reasoning in *In re Blake*, petitioner was statutorily ineligible for relief under former Section 212(c), because the charge of deportability on the basis of a conviction for sexual abuse of a minor has no statutory counterpart among the grounds of inadmissibility. Pet. App. 81-82. The Board expressly observed that "former [S]ection 212(c) * * * did not pardon or waive crimes, *per se*, it waived *grounds* of inadmissibility, some of which arose from crimes." *Id.* at 82-83; accord *In re Balderas*, 20 I. & N. Dec. 389, 391 (B.I.A. 1991) (explaining that "a grant of [S]ection 212(c) relief 'waives' the finding of excludability or deportability

rather than the basis of the excludability itself [*i.e.*, the criminal offense]"). Thus, "it is not enough that the alien's particular offense could have constituted a valid factual predicate for a charge of inadmissibility." Pet. App. 83. Rather, "the applicant for [S]ection 212(c) relief must demonstrate with respect to the ground of deportability at issue in his case that Congress has employed similar language to describe substantially equivalent categories of offenses in the grounds of inadmissibility." *Ibid.*

3. Petitioner sought judicial review of the Board's decision, and a panel of the Ninth Circuit denied his petition with respect to his application for relief under former Section 212(c). Pet. App. 37-78. The court accepted the Board's decision in *In re Blake*, concluding that its statutory-counterpart test is consistent with the statute, with 8 C.F.R. 1212.3(f), and with "past administrative and judicial interpretations of the statute," Pet. App. 55-56, 56-58, 62; that the test does not result in an equal protection violation, *id.* at 62-65; and that it does not present any "retroactivity problem" because "[s]ince at least the 1970s an alien in [petitioner's] position would not have had any reasonable expectation of § 212(c) relief," *id.* at 66.

4. The court of appeals granted rehearing en banc, and, on January 5, 2009, denied in part and dismissed in part, petitioner's petition for review of the Board's decision. Pet. App. 1-36. Although the majority of the en banc court reached the same result as the original panel, its reasoning differed from that of the panel and from that advanced by the government. The court reexamined previous cases requiring that Section 212(c) eligibility be extended to certain classes of deportable aliens notwithstanding Section 212(c)'s reference only to aliens

seeking to "be admitted." In particular, the court "reconsider[ed]" circuit precedent that had "reasoned that there is no rational basis for granting additional immigration relief to aliens who temporarily leave the United States and try to reenter (i.e., aliens facing inadmissibility), and not to aliens who remain in the United States (i.e., aliens facing deportation)," *id.* at 5 (citing *Tapia-Acuna* v. *INS*, 640 F.2d 223, 225 (9th Cir. 1981)), as well as the Second Circuit's similar decision in *Francis*, *supra*. Finding that the "plain language" of former Section 212(c) "gives the Attorney General discretion to grant lawful permanent residents relief only from *inadmissibility*—not deportation," Pet. App. 4, the court concluded that it was "not convinced that *Francis* and *Tapia-Acuna* accorded sufficient deference to this complex legislative scheme." *Id.* at 5.

Applying rational-basis review to Congress's apparent decision to accord excludable but not deportable aliens the right to seek Section 212(c) relief, the court of appeals observed that "Congress could have limited [S]ection 212(c) relief to aliens seeking to enter the country from abroad in order to 'create[] an incentive for deportable aliens to leave the country.'" Pet. App. 6 (quoting *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999), and *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000)). The court further explained:

> A deportable alien who wishes to obtain [S]ection 212(c) relief will know that he can't obtain such relief so long as he remains in the United States; if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting

> these aliens[,] * * * [which] is certainly a legitimate congressional objective.

Id. at 6-7 (internal citations omitted). The court explained that, although the government might later choose to admit an alien who had thus departed, "[t]he rationality of the statute lies in giving that discretion, on a case by case basis, to an agency that can assess the likelihood of the alien's success and the cost of his removal." *Id.* at 7. For those aliens who apply for and do not receive Section 212(c) relief, "it makes perfect sense to want them to be outside our borders when they get the bad news." *Id.* at 8. Accordingly, the court "overrule[d] *Tapia-Acuna*'s holding that there's no rational basis for providing [S]ection 212(c) relief from inadmissibility, but not deportation," and it held that the Board "didn't violate petitioner's right to equal protection by finding him ineligible for [S]ection 212(c) relief from deportation." *Id.* at 9. Although petitioner had sought reconsideration of whether the court's earlier decision in *Komarenko* had appropriately limited *Tapia-Acuna* to instances in which the ground for an alien's deportation has a statutory counterpart in a ground for inadmissibility, the court concluded that it was unnecessary to decide *Komarenko*'s continuing constitutional validity because "its only purpose was to fill a gap created by *Tapia-Acuna*." *Ibid.*

Finally, the court of appeals left intact the Board's statutory-counterpart rule by expressly acknowledging the continuing legitimacy of 8 C.F.R. 1212.3(f)(5). Pet. App. 8-9. It stated: "nothing we say today casts any doubt on the regulation," *id.* at 9, which would thus allow an otherwise-qualified deportable permanent resident alien in the Ninth Circuit to apply for Section

212(c) relief when there is a comparable ground of inadmissibility.

Judge Clifton concurred, in an opinion joined by Judges Silverman and Gould. Pet. App. 11-23. They agreed with the original panel decision and its reliance on *Komarenko*, because they concluded that "aliens who could have been, but were not, charged with removal on grounds equivalent to a ground for inadmissibility are not similarly situated to aliens who were actually so charged." *Id.* at 12. The concurring judges reasoned that "[a]n alien is no more entitled to [S]ection 212(c) relief when charged with a ground of removal that has no statutory counterpart under the INA's inadmissibility provisions than a defendant is entitled to a sentencing range consistent with the least serious crime with which he could have been charged." *Id.* at 20-21. Because "two aliens who have been charged with removal on different statutory grounds are not similarly situated," the concurring judges concluded that petitioner had suffered no equal protection violation. *Id.* at 19-20.

A dissent by Judge Thomas, joined by Judge Pregerson, concluded that the majority's application of former Section 212(c) to aliens who are inadmissible but not to those who are deportable lacked a rational basis and thus violated equal protection. Pet. App. 23-24. The dissenters would, in their words, have "overrule[d] *Komarenko* (applying a comparable grounds test), and follow[ed] the lead of the Second Circuit's well-articulated opinion in *Blake* [v. *Carbone*] (applying an offense-specific test)." *Id.* at 33 (citations omitted).

5. Petitioner sought rehearing by the full court. On August 18, 2009, the court denied that request. Pet. App. 92. Judge Berzon, joined by six other judges, dissented. *Id.* at 92-113.

ARGUMENT

The decision of the court of appeals correctly left in place the Board's statutory-counterpart test, codified in a regulation that sets forth criteria for granting relief under former Section 212(c) of the INA. The issue presented concerns a statutory section that was repealed more than 13 years ago, and that therefore is of greatly diminished importance. Moreover, every court of appeals to have addressed the question (except the Second Circuit) would deny petitioner relief. This court has recently denied certiorari in two cases presenting a similar question. See *Birkett* v. *Holder*, 129 S. Ct. 2043 (2009) (No. 08-6816); *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009) (No. 08-605). Further review is similarly unwarranted in this case. Petitioner repeats much of the argument from the pending petition for a writ of certiorari in *De la Rosa* v. *Holder*, No. 09-594 (filed Nov. 13, 2009). Petitioner asks (Pet. 18, 21) for his petition to be held for the disposition of that case, which he says (Pet. 21) "squarely address[es] the underlying issue" he wants this Court to consider. Just as certiorari should be denied in *De la Rosa*, certiorari should be denied in this case.

1. As petitioner acknowledges (Pet. 19), the First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have concluded in published opinions that the Board's application of the statutory-counterpart test constitutes a permissible interpretation and implementation of former Section 212(c) and does not violate equal protection. See, *e.g.*, *Kim* v. *Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 162-163 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 371-372 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009); *Zamora-Mallari* v. *Mu-*

kasey, 514 F.3d 679, 691-692 (7th Cir. 2008); *Vue* v. *Gonzales*, 496 F.3d 858, 860-862 (8th Cir. 2007); *De la Rosa* v. *United States Att'y Gen.*, 579 F.3d 1327, 1335 (11th Cir. 2009), petition for cert. pending, No. 09-594 (filed Nov. 13, 2009).[2]

Although the Ninth Circuit's legal analysis in this case was different, petitioner acknowledges (Pet. 20) that "there is no practical difference between the *en banc* [c]ourt's holding" and the holding of these other circuits, which have approved the Board's practice following *In re Blake*, 23 I. & N. Dec. 722 (2005), because both approaches "leave in place the implementing regulations and their interpretation by the [Board]," Pet. 20. The court of appeals expressly stated that its decision did not "cast[] any doubt on the regulation" that codified the Board's statutory-counterpart rule. Pet. App. 9. And subsequent decisions from the Ninth Circuit and the Board bear out that result. See *Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (applying 8 C.F.R. 1212.3(f)(5) and finding alien ineligible for Section 212(c) relief because the grounds for his removal did not have statutory counterparts among the grounds of inadmissibility); *In re Moreno-Escobosa*, 25 I. & N. Dec. 114, 117 (B.I.A. 2009) ("[T]he Ninth Circuit's decision in *Abebe* v. *Mukasey* can be fairly read as rejecting the equal protection challenge to the application of the statutory counterpart rule.").

The only court of appeals to have reached a different result is the Second Circuit, in *Blake* v. *Carbone*, 489 F.3d 88, 103-104 (2007).

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[2] The Tenth Circuit has applied the statutory-counterpart rule in an unpublished decision. *Alvarez* v. *Mukasey*, 282 Fed. Appx. 718, 723 (2008).

2. Although petitioner concedes (Pet. 21) that "the Ninth Circuit does not squarely address the underlying issue," he contends (Pet. 21-27) that the statutory-counterpart rule applied by the Board violates the equal protection component of the Fifth Amendment's Due Process Clause. Petitioner argues (Pet. 22) that the Board's decision in *In re Blake* "creates an irrational distinction between [lawful permanent residents] who have traveled abroad and [those] who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection." Petitioner thus essentially contends as follows: If he had left the United States and attempted to return, his conviction for committing a lewd act upon a child could have subjected him to removal based on a charge of inadmissibility for having committed "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), and that would have made him eligible for Section 212(c) relief. Petitioner contends that it is irrational for him to be ineligible for Section 212(c) relief because he remained within the United States and thus was subject to removal based on the charge of having committed the aggravated felony of sexual abuse of a minor—a ground that the Board holds is not comparable to the inadmissibility ground of having committed a crime involving moral turpitude. This argument is without merit.

a. As an initial matter, petitioner errs in contending that:

> Before 2005, the [Board] consistently held that [a lawful permanent resident] deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief from removal if the underlying

> conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under [8 U.S.C. 1182(a)(2)(A)(i)]).

Pet. 21. Petitioner cites no Board precedent holding that an alien who has been convicted of a crime rendering him deportable as an aggravated felon on the grounds of "sexual abuse of a minor" or a "crime of violence" is categorically eligible for relief if his particular crime could have served as a basis for inadmissibility.[3]

b. As this Court has repeatedly stated: "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Thus, whether an immigration provision is constitutional depends only on the existence of a "facially legitimate and bona fide reason" for its enactment. *Id.* at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1992)).

As a general matter, Congress has determined that the statutory regime that applies to an alien who has already been admitted to the country is different from the one that applies to an alien who is seeking admission. Compare 8 U.S.C. 1182, with 8 U.S.C. 1227. It is thus unsurprising that the categories of offenses that make an alien inadmissible are not always the same as those that may render an alien deportable from the country. That fundamental legislative choice shows that aliens

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[3] As the government noted in its brief opposing certiorari in *De la Rosa* (at 11-12), the only precedential opinions cited by that petitioner were distinguishable, and *In re Blake* is the only precedential decision of the Board to have specifically addressed the ground of removal for sexual abuse of a minor. See 23 I. & N. Dec. at 724-728.

who are inadmissible are not situated similarly to aliens subject to removal on grounds of being deportable, even though there may be some overlap between the underlying conduct that renders an alien inadmissible and the conduct that renders an alien deportable. It is only when a statutory ground that renders an alien deportable under the one regime has a statutory counterpart that renders an alien inadmissible under the other regime that the two aliens could be said to be similarly situated for equal protection purposes (and thus warrant the application of former Section 212(c) to the category of aliens to whom it did not, by its own terms, apply).

The reasoning employed in *Komarenko* v. *INS*, 35 F.3d 432 (9th Cir. 1994), which was followed by the concurring opinion in the court of appeals (Pet. App. 11-23) and has also been endorsed by most of the other courts of appeals, is persuasive.[4] In *Komarenko*, the Ninth Circuit rejected a similar equal protection claim in finding that two groups of aliens convicted of different crimes were not similarly situated for purposes of eligibility for Section 212(c) relief. *Id.* at 435. The court concluded that the "linchpin of the equal protection analysis in this context is that the two provisions be 'substantially identical.'" *Ibid.*; see also *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 952 (7th Cir. 1993). Komarenko contended that the court was required to "focus on the facts of his individual case and conclude that because he *could have been* excluded under the moral turpitude provision, he has been denied equal protection." *Komarenko*, 35 F.3d at 435. The court, however, refused "to speculate

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[4] In light of its decision to overrule the Ninth Circuit's decision in *Tapia-Acuna*, the en banc majority opinion in the court of appeals found it unnecessary to reconsider *Komarenko*, as petitioner had invited. Pet. App. 9.

whether the I.N.S. would have applied this broad excludability provision to an alien in Komarenko's position," because engaging in such speculation "would extend discretionary review to every ground for deportation that could constitute 'the essential elements of a crime involving moral turpitude.'" *Ibid.* Such an approach, the Ninth Circuit explained in *Komarenko*, would be tantamount to "judicial legislating," would "vastly overstep" the courts' "limited scope of judicial inquiry into immigration legislation," and "would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Ibid.* (quoting *Fiallo*, 430 U.S. at 792). Accordingly, the court "decline[d] to adopt a factual approach to * * * equal protection analysis in the context of the deportation and excludability provisions of the INA," and it "conclude[d] that Komarenko was not denied his constitutional right to equal protection of the law." *Ibid.*

Thus, under the rational-basis standard of review, Congress may draw lines on the basis of general categories without regard to the circumstances of a particular individual. See, *e.g.*, *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is only when the statutory ground for a deportable alien's removal from the country has a statutory counterpart in the grounds for inadmissibility that a deportable alien is arguably similarly situated to inadmissible aliens. See *Komarenko*, 35 F.3d at 435. As the Seventh Circuit has explained:

> [C]ertain deportable aliens may receive exclusion-type relief as if they were subject to exclusion rather than deportation. But that fiction requires that the aliens be excludable *for the same reasons* that render them deportable—a situation not necessarily true for all aliens facing deportations. Accordingly, [S]ection

> 212(c) relief was not extended to aliens whose deportability was based on a ground for which a comparable ground of exclusion did not exist.

Leal-Rodriguez, 990 F.2d at 949 (emphasis added). The Seventh Circuit therefore held in *Leal-Rodriguez* that an alien who was deportable for entering the United States without inspection was not eligible for Section 212(c) relief because there was no ground of inadmissibility that corresponded to that ground of deportation. *Id.* at 948, 950.

In this case, petitioner's argument similarly fails because his ground of deportation (for having been convicted of the aggravated felony of sexual abuse of a minor) is not "substantially equivalent" or "substantially identical" to a ground of inadmissibility under Section 212(a) of the INA. *Komarenko*, 35 F.3d at 435. As the Board correctly reasoned in *In re Blake*, sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A) lacks a statutory counterpart among the grounds of inadmissibility in Section 212(a). Although sexual abuse of a minor may constitute "a crime involving moral turpitude" under Section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(I), the latter category addresses a distinctly different and much broader category of offenses than a charge for an aggravated felony of sexual abuse of a minor. Thus, while the statutory-counterpart test does not require a perfect match, the ground of inadmissibility must address essentially the same category of offense on which the removal charge is based.

Under the pertinent regulations and the Board's decisions, that test is not met merely by showing that some (or even many) of the aliens whose underlying offenses are included in a given category could also have their crimes characterized as ones involving moral turpitude.

See, *e.g.*, *Zamora-Mallari*, 514 F.3d at 693 (holding that the aggravated felony of sexual abuse of a minor has no statutory counterpart in the grounds of inadmissibility); *Avilez-Granados* v. *Gonzales*, 481 F.3d 869, 871-872 (5th Cir. 2007) (same). That analysis is also firmly supported by the unanimous opinions of the courts of appeals holding that a firearms offense (which is a ground of removability under 8 U.S.C. 1227(a)(2)(C)) has no statutory counterpart under Section 212(a), even though "many firearms offenses may also be crimes of moral turpitude."[5] *In re Blake*, 23 I. & N. Dec. at 728.

Thus, because petitioner is not similarly situated to an inadmissible alien who has been convicted of a crime involving moral turpitude, and because he is not being treated any differently from other aliens who are deportable upon grounds that themselves have no corre-

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[5] For the same reason, petitioner's contention (Pet. 26) that the Board erroneously interpreted 8 C.F.R. 1212.3(f)(5) so as to "confine" this Court's decision in *St. Cyr*, rather than "implement" it, fails. Petitioner argues that the Board, in *In re Blake*, impermissibly interpreted 8 C.F.R. 1212.3(f)(5) inconsistently with its "prior practice of holding that [a lawful permanent resident alien] deportable for having committed an aggravated felony was eligible for section 212(c) relief if the conviction would also fall under a counterpart inadmissibility provision." Pet. 26 (emphasis omitted). But petitioner's characterization of the Board's prior practice is flawed, because it overlooks the fact that the Board has always considered whether the charged statutory ground of deportability compared with any statutory ground of inadmissibility, and not whether the alien's underlying crime could have formed the basis for a different charge of inadmissibility. See *In re Blake*, 23 I. & N. Dec. at 728; Pet. App. 59 (initial panel opinion) ("[T]he BIA has not recently changed course but rather has maintained a consistent position for many years."). As a result, petitioner's objections (Pet. 26) to an allegedly "retroactive application" of 8 C.F.R. 1212.3(f)(5) are unfounded.

sponding ground of inadmissibility, his equal protection claim is meritless.[6]

3. Although the Second Circuit has reached a different result, the "underlying issue" that petitioner raises (Pet. 21) is not a question of sufficient importance to warrant this Court's review. The Second Circuit is an outlier: eight other circuits, including the Ninth Circuit below, have approved the Board's approach in *In re Blake*. And this Court denied certiorari twice last year, well after the Second Circuit had issued its decision in *Blake* v. *Carbone*, *supra*. See *Birkett*, *supra*; *Gonzalez-Mesias*, *supra*. Moreover, petitioner's question concerns an alien's eligibility for a form of discretionary relief under a statute that was repealed more than 13

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[6] Petitioner contends (Pet. 22) that the relevant comparison should be between deportable aliens who have left the country and those who have not, because a deportable alien who left the country could be treated as if he had been put into proceedings upon reentry such that relief was available *nunc pro tunc*. But, other than *Blake* v. *Carbone*, the authority he offers is *In re L–*, 1 I. & N. Dec. 1 (B.I.A. 1940), which addressed "the power to retroactively grant the Attorney General's discretion to permit an alien to reapply for admission after being deported and subsequently reentering the country." *Ramirez-Canales* v. *Mukasey*, 517 F.3d 904, 910 (6th Cir. 2008). The cases in which the Board has applied Section 212(c) or its predecessor provisions make clear that, although "[i]t has long been the administrative practice to exercise the discretion permitted by the foregoing provisions of law, *nunc pro tunc*," the Board does so only "where complete justice to an alien dictates such extraordinary action." *In re T–*, 6 I. & N. Dec. 410, 413 (B.I.A. 1954). Thus, while "the equitable power to grant orders *nunc pro tunc* is conceptually broad," *Ramirez-Canales*, 517 F.3d at 910, its application is wholly discretionary and it is limited to extraordinary cases—not every case in which an alien is otherwise eligible for relief. For the same reasons that petitioner is not similarly situated to an alien who departed and is seeking to re-enter, complete justice would not mandate the application of *nunc pro tunc* discretion.

years ago and is only potentially applicable to him on the theory that he might have relied on being eligible for it had his removal proceedings been initiated before the 1996 enactments. See *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001). But the statutory-counterpart test to which petitioner objects is not new—indeed, it long predated the repeal of Section 212(c) in 1996 (see pp. 2-3, *supra*; *Blake*, 489 F.3d at 98-99)—and petitioner could have easily avoided its effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2005. Cf. *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 (2006) ("It is therefore the alien's choice to continue his illegal presence * * * that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.").

In contending that his case presents an issue of exceptional importance, petitioner cites a statistic about 10,000 grants of Section 212(c) relief between 1989 and 1995. Pet. 28 (quoting *St. Cyr*, 533 U.S. at 296). That figure is of little relevance here not only because of its age but also because Section 212(c) was still in effect between 1989 and 1995. In recent years, the number of grants of relief under former Section 212(c) has been smaller and declining. It went from 1905 grants in FY 2004 to 858 grants in FY 2009—a 55% decline. See Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book* Table 15, at R3 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell even more dra-

matically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline since FY 2008.

Of course, the number of aliens who could be affected by the outcome of this case is necessarily even smaller, since an alien would not become eligible for discretionary relief under petitioner's theory unless he or she met, at a minimum, each of the following criteria: (1) lawful-permanent-resident status; (2) a conviction predating the repeal of Section 212(c) that (3) resulted from a plea of guilty or no contest (rather than a trial);[7] and (4) a removal charge that has no comparable ground of inadmissibility except when considered on the basis of the facts of the underlying offense. Given the limited nature of that class, there is no merit to petitioner's assertion (Pet. 27) that this case presents an issue of "[e]xceptional [a]nd [c]ontinuing [i]mportance."

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[7] In some circuits, *St. Cyr* has been applied to allow some aliens who were convicted after a trial to be eligible for relief under former Section 212(c). The Court most recently denied certiorari on that question in *Ferguson* v. *Holder*, cert. denied, No. 09-263 (Mar. 8, 2010), and *Molina-De La Villa* v. *Holder*, cert. denied, No. 09-640 (Mar. 22, 2010). There is no evident reason why questions of statutory comparability associated with granting relief under former Section 212(c) are of any greater continuing importance than the questions about retroactivity analysis under former Section 212(c) that were presented in *Ferguson* and *Molina-De La Villa*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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